

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB Nos. 17-0048  
and 17-0048A

|                                 |   |                                   |
|---------------------------------|---|-----------------------------------|
| CHARLES ZUMWALT                 | ) |                                   |
|                                 | ) |                                   |
| Claimant-Petitioner             | ) |                                   |
| Cross-Respondent                | ) |                                   |
|                                 | ) |                                   |
| v.                              | ) | DATE ISSUED: <u>Sept. 6, 2018</u> |
|                                 | ) |                                   |
| NATIONAL STEEL AND SHIPBUILDING | ) |                                   |
| COMPANY                         | ) |                                   |
|                                 | ) |                                   |
| Self-Insured                    | ) |                                   |
| Employer-Respondent             | ) |                                   |
| Cross-Petitioner                | ) |                                   |
|                                 | ) |                                   |
| DIRECTOR, OFFICE OF WORKERS'    | ) |                                   |
| COMPENSATION PROGRAMS, UNITED   | ) |                                   |
| STATES DEPARTMENT OF LABOR      | ) |                                   |
|                                 | ) | ORDER on                          |
| Respondent                      | ) | RECONSIDERATION                   |

Claimant has filed a timely “Second Motion for Reconsideration and for Vacatur” of the Board’s Decision and Order on Reconsideration En Banc in *Zumwalt v. Nat’l Steel & Shipbuilding Co.*, \_\_ BRBS \_\_, BRB Nos. 17-0048/A (June 13, 2018), in which the Board affirmed its April 26, 2017, Order dismissing the appeals as untimely filed. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Pursuant to *Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044 (2018), claimant contends the Board should vacate its decisions and the underlying Order Denying Reconsideration of Fee Award of Administrative Law Judge Steve B. Berlin and remand the case for a properly appointed administrative law judge “to revisit the fee award on reconsideration.” Employer and the Director, Office of Workers’

Compensation Programs, have responded to claimant's motion, urging the Board to deny it because, inter alia, claimant's contention was not raised in a timely fashion.<sup>1</sup>

We deny claimant's motion. Claimant did not challenge the administrative law judge's authority to hear this claim in his initial appeal to the Board and thus forfeited his Appointments Clause argument. The regulation at 20 C.F.R. §802.211 requires a party represented by counsel to file a brief which sets forth the issues to be considered by the Board and the facts and law supporting the party's contentions. Thus, it is well established that a party cannot raise a new issue to the Board for the first time in a motion for reconsideration.<sup>2</sup> *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002). The Appointments Clause issue is "non-jurisdictional," see *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009), and thus is subject to the doctrines of waiver and forfeiture. *Id.*; see *Lucia*, 138 S. Ct. at 2055 ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief").

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<sup>1</sup> We accept these responses, which were filed out of time. 20 C.F.R. §802.217(a), 802.219(e).

<sup>2</sup> In this case, claimant attempts to raise the issue for the first time in a second motion for reconsideration.

Accordingly, claimant's motion for reconsideration is denied. 20 C.F.R.  
§§801.301(c), 802.407(d), 802.409.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge